Title 10 United States Code

§ 2313. Examination of books and records of contractor*

(a) An agency named in section 2303 of this title is entitled, through an authorized representative, to inspect the plant and audit the books and records of—

(1) a contractor performing a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter; and

(2) a subcontractor performing any subcontract under a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter.

(b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

(c) Subsection (b) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the head of the agency determines, with the concurrence of the Comptroller General or his designee, that the application of that subsection to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required—

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*The phrase "except as provided in subsection (c)," in subsection (b), and subsection (c) were added September 27, 1966 by Public Law 89-607, § 1(2), 80 Stat. 850.

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the head of the agency determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by not applying subsection (b).

If subsection (b) is not applied to a contract or subcontract based on a determination under clause (2), a written report shall be furnished to the Congress.

§ 2306(f)

"A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current—

"(1) Prior to the award of any negotiated prime contract under this title where the price is expected to exceed $100,000;

"(2) Prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency;

"(3) Prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000; or

"(4) Prior to the pricing of any contract change or modification to a subcontract covered by (3) above, for which

the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency.

"Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent: *Provided,* That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination."

Title 18 United States Code

§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which

information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Armed Services Procurement Regulation, Title 32 Code of Federal Regulations[1]

§ 1-102 *Applicability of subchapter.*

This subchapter shall apply to all purchases and contracts made by the Department of Defense, within or outside the United States, for the procurement of supplies or services which obligate appropriated funds (including available contract authorizations), unless otherwise specified herein (but see § 1.109-4). [32 C.F.R. § 1.102 (1960); 24 Federal Register 3582 (May 5, 1959)][2]

§ 1-201 *Definitions.* As used throughout this subchapter, the following terms shall have the meaning set forth below: [32 C.F.R. § 1.201 (1960); 22 Federal Register 11040 (Dec. 31, 1957)][3]

§ 1-201.6 *Contracts.* "Contracts" means all types of agreements and orders for the procurement of supplies or services. It includes awards and preliminary notices of award; contracts of a fixed-price, cost, cost-plus-a-fixed-fee,

1. As the same were in effect when the contracts involved in this action were executed.

2. Current version: 32 C.F.R. § 1.102 (1967).

3. Current version: 32 C.F.R. § 1.201 (1967).

or incentive type; contracts providing for the issuance of job orders, task orders or task letters thereunder; letter contracts, letters of intent, and purchase orders. It also includes amendments and supplemental agreements with respect to any of the foregoing. [32 C.F.R. § 1.201-6 (1954); 22 Federal Register 11057 (Dec. 31, 1957)][4]

§ 3-403 *Fixed-price-type contracts.* The fixed-price-type contract generally provides for a firm price, or under appropriate circumstances may provide for an adjustable price, for the supplies or services which are being procured. Fixed-price contracts are of several types so designed as to facilitate proper pricing under varying circumstances. [32 C.F.R. § 3.403 (1960); 20 Federal Register 3727 (May 27, 1955)][5]

§ 3-403.1 *Firm fixed-price contract*—(a) *Description.* The firm fixed-price contract provides for a price which is not subject to any adjustment by reason of the cost experience of the contractor in the performance of the contract. This type of contract, when appropriately applied as set forth in paragraph (b) of this section, places the maximum risk and responsibility upon the contractor and affords him the greatest incentive for efficient performance with the resultant benefits in earnings. Utilization of the firm fixed-price contract imposes a minimum administrative burden on the contracting parties.

(b) *Applicability.* The firm fixed-price contract is suitable for use in procurements when stable and reasonably definite specifications are available and when fair and reasonable pricing can be achieved, such as where (1) adequate competition has made initial quotations effective; (2) prior purchases of the same or similar supplies or services provide reasonable price comparison; (3) experienced

4. Current version: 32 C.F.R. § 1.201-4 (1967).

5. Current version: 32 C.F.R. § 3.404-1 (1967).

cost information or sound estimates of the probable cost of performance are available in the negotiation of contract prices; or (4) any other reliable basis for proper pricing can be utilized consistent with the purpose of this type of contract. The firm fixed-price contract is particularly suitable in the purchase of standard commercial items, modified commercial items, or military items for which adequate information on production and cost is available.

(c) *Limitation.* The firm fixed-price contract shall not be used when contingencies proposed in the contract price are considered unreasonable. [32 C.F.R. § 3.403-1 (1960); 20 Federal Register 3727-3728 (May 27, 1955)][6]

§ 7-104.15 *Examination of records.*

Pursuant to 10 U.S.C. 2313(b), the following clause will be inserted in all negotiated fixed-price supply contracts in excess of $2,500, except as provided in § 6.701 of this subchapter.

Examination of Records

(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor involving transactions related to this contract.

(b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of

6. Current version: 32 C.F.R. § 3.404-2 (1967).

such subcontractor involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding $1,000 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public. [32 C.F.R. § 7.104-15 (1960); 22 Federal Register 11049 (Dec. 31, 1957); 24 Federal Register 891 (February 9, 1959)][7]

7. Current version: 32 C.F.R. § 7.104-15 (1967).

Appendix B

Original Filed Jun 28 1966
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In the United States District Court for the Northern District of California, Southern Division

Civil No. 41881

United States of America,
Plaintiff,

v.

Hewlett-Packard Company, a corporation; David Packard; and Wilfred F. Cavier,
Defendants.

ORDER AND JUDGMENT

This cause came on to be heard on Motion of Plaintiff for Summary Judgment and on Cross-Motion of Defendants for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, the Stipulation of Facts and its

exhibits, and the Court having heard arguments of counsel, and having found that there is no genuine issue of fact to be submitted to the Trial Court, and having concluded that plaintiff is entitled to a judgment as a matter of law, it is hereby

ORDERED that plaintiff's Motion for Summary Judgment be and the same hereby is granted; and it is further

ORDERED that the defendants' Cross-Motion for Summary Judgment be and the same hereby is denied; and it is further

ORDERED, ADJUDGED, DECREED AND DECLARED as follows:

1. Pursuant to the provisions contained in Contracts Numbered AF 33(604)-22221, AF 33(604)-31884, AF 33 (604)-22362 and AF 33(604)-28645 and the provisions of 10 USC § 2313(b), the Comptroller General of the United States and his duly authorized representatives have the right to examine those books, documents, papers and records of HEWLETT-PACKARD COMPANY that directly pertain to, and involve transactions relating to, the aforesaid contracts.

2. The books, documents, papers and records of HEWLETT-PACKARD COMPANY relating to the cost of producing the items furnished by HEWLETT-PACKARD COMPANY under the aforesaid contracts, including costs of direct material, direct labor and overhead costs, directly pertain to, and involve transactions relating to, the aforesaid contracts.

3. The Comptroller General and his duly authorized representatives have the right to examine the books, documents, papers and records of HEWLETT-PACKARD

COMPANY which relate to or otherwise disclose the cost of producing the items furnished under the aforesaid contracts, including costs of direct material, direct labor and overhead costs.

4. The defendants HEWLETT-PACKARD COMPANY, David Packard and Wilfred F. Cavier, and their agents, servants, attorneys, employees, and all persons in active concert or participation with them who receive actual notice of this judgment by personal service or otherwise, are hereby enjoined from preventing the duly authorized representatives of the Comptroller General of the United States from obtaining access to and examining, at reasonable times and places during regular business hours, the books, documents, papers and records mentioned in paragraph 2 of this judgment; and all said defendants and their agents, servants, attorneys, employees, and all persons in active concert or participation with them who receive actual notice of this judgment by personal service or otherwise, are hereby directed and enjoined to make the said books, documents, papers and records available to the authorized representatives of the Comptroller General on the premises of HEWLETT-PACKARD COMPANY at Palo Alto, California, at all reasonable times required by said representatives during the regular business hours of defendant HEWLETT-PACKARD COMPANY, with leave to the plaintiff to reapply for further relief if necessary.

5. Provided, however, that all rights of examination herein decreed and all mandatory and prohibitive injunctive provisions herein ordered shall be suspended for a period of 60 days from and after the entry of this judgment, and if a Notice of Appeal from this judgment is filed within said 60 days, then said rights of examination

and said injunctive provisions shall be further suspended during the pendency of such appeal.

6. Defendants are hereby ordered and directed during the suspension of any provision of this judgment to safely keep and maintain all books, documents, papers and records of the HEWLETT-PACKARD COMPANY now in their possession or under their control which relate to the cost of producing the items furnished by HEWLETT-PACKARD COMPANY under the aforesaid contracts.

7. Let Judgment be entered accordingly.

Dated: Jun 27 1966.

LLOYD W. BURKE
United States District Judge

United States Court of Appeals
for the Ninth Circuit

No. 21,323

Hewlett-Packard Company, a corporation; David Packard; and Wilfred F. Cavier,
Appellants,

vs.

United States of America,
Appellee.

[November 15, 1967]

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: CHAMBERS, HAMLEY and HAMLIN, Circuit Judges

HAMLEY, Circuit Judge:

The United States brought this action against Hewlett-Packard Company, a corporation, to enforce the Government's asserted right under 10 U.S.C. § 2313(b) (1964) to examine certain books and records of the company.[1] Plaintiff sought declaratory and injunctive relief. After defendants filed a responsive pleading the parties stipulated as to the relevant facts and filed cross motions for summary judgment. The district court granted the motion of the United States, denied that of Hewlett-Packard, and entered a judgment substantially as prayed for in the complaint. Hewlett-Packard appeals.

1. David Packard and Wilfred F. Cavier, President and Vice-President-Finance of Hewlett-Packard, respectively, were also named defendants, but it will not be necessary to make further reference to them in this opinion.

Hewlett-Packard is a manufacturer of electronic test and measurement equipment designed for general use where great precision in measurement is required. During the period from March, 1959 to January, 1961, the United States Department of the Air Force awarded to Hewlett-Packard four negotiated firm fixed-price contracts for equipment. The parties are agreed that, for the purposes of this case, the two contracts referred to below may be regarded as typical.

One of these, designated No. AF 33(604) 22221, was executed on March 16, 1959. It provided for the sale, to the United States, of standard commercial items of equipment then sold by Hewlett-Packard in substantial quantities to the general public. With one exception, each such item had been included in Hewlett-Packard's regularly published catalog for the previous three years or more. The catalog listed items for sale to the public at indicated prices. Each item qualified as a standard commercial article as defined by the Renegotiation Act of 1951, 65 Stat. 7, added by 70 Stat. 790 (1956), 57 U.S.C. App. § 1216(e) (1964), and was therefore exempt from renegotiation.[2]

In the contract of March 16, 1959, the contract price was determined upon the basis of the listed catalog prices of the particular item of equipment, less a volume discount. The Government's Request for Proposal which was incorporated into the contract contained a form statement of

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2. Under this section the provisions of the Renegotiation Act were made mandatorily inapplicable to amounts received or accrued in a fiscal year under any contract or subcontract for a standard commercial article. In Senate Report 643, July 25, 1953, U.S. Code Cong. & Admin. News (1954), p. 3880, the committee gave the following reasons for making this exemption mandatory rather than permissive:

> "The committee believes that in the case of standard commercial articles there is in most cases no basis or need for renegotiation since cost and pricing experience has already been acquired and prices made in a competitive market."

additional terms and conditions, but only the clauses check [sic] by the Government were to be applicable. One clause, entitled "Cost Data Information," called for the seller to provide the Government with detailed data concerning such cost items as material, labor and overhead. However, this clause was not checked and was therefore not applicable. Hewlett-Packard did not supply to the Government any information as to the costs of production or profit margins upon any of the items listed in this contract.

The other contract which the parties regarded as typical, designated No. AF 33 (604)-31882 [sic; should be -31884], was executed on January 30, 1961. This contract related to only one item of equipment, namely Hewlett-Packard instrument Model No. 620A. This was a standard commercial item then sold by the company in substantial quantities to the general public. The item had been included in Hewlett-Packard's regularly published catalog since 1952, for sale to the public at a catalog list price. The price had remained unchanged since the original date of introduction of the item.

At the date of execution of this contract, this item of equipment qualified as a standard commercial article as defined by the Renegotiation Act of 1951, as amended, and was therefore exempt from negotiation [sic; should be renegotiation]. The contract price was determined upon the basis of the listed catalog price, less a volume discount. Hewlett-Packard did not supply to the Government any information as to any of the company's costs of production or profit margins upon this contract item.[3]

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3. In a memorandum dated January 4, 1961, prepared by employees of the Air Force, setting forth facts as to the negotiation of this contract, the following statement was made:

> "2. The Field Analyst was not contacted to evaluate subject proposal due to urgency (AOCP) of this proposal and

All four contracts were negotiated pursuant to chapter 137, Title 10, U.S.C. §§ 2301-14, entitled "Procurement Generally." A subsection of that chapter, 10 U.S.C. § 2313(b), provides that each contract negotiated under chapter 137 shall provide that the Comptroller General and his representatives are entitled for a period of three years after final payment, to examine any books, documents, papers or records of the contractor, or any of his subcontractors:

> "that directly pertain to, and involve transactions relating to, the contract or subcontract."

Consistent with this statutory provision each of the four contracts referred to above contained a clause 10, giving the Comptroller General and his representatives for a period of three years after final payment, access to and the right to examine:

> "any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract."[4]

Purporting to exercise rights accorded by clause 10 of these contracts, representatives of the Comptroller General commenced an examination of the books and records of Hewlett-Packard in September, 1962. During this examination the company permitted access to books and records relating to sales prices of various instruments and parts sold under the four contracts. The representatives of the

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the fact that competition was involved. In addition, subject item is listed in contractor's catalogue."

An agency regulation pertaining to firm fixed-price contracts, and an agency statement of contract pricing policy, appear to recognize that production costs need not be inquired into in connection with the purchase of items having an established catalog or market price. (32 C.F.R. § 3.403.1 (1955), now 32 C.F.R. § 3.404.2 (1964), Defense Procurement Circular No. 5, May 12, 1964.)

4. The parties seem to be agreed that clause 10 in the four contracts in question was intended to give the Comptroller General the same rights of examination as specified in section 2313(b).

Comptroller General then requested all books, documents, papers or records of Hewlett-Packard:

> "relating to the pricing and cost of performance, support for prices charged to the Government, and such other necessary information which would permit such Representatives to review the reasonableness of the contract prices provided for in the aforesaid contracts."

This request was refused by Hewlett-Packard upon the ground that cost of production information was not directly pertinent to these contracts. In this suit, which the United States then instituted, the trial court disagreed with Hewlett-Packard, and judicially declared that the company's costs of direct material, direct labor and overhead costs in producing the items furnished under the contracts, directly pertain to, and involve transactions relating to, those contracts. The court further declared that the Comptroller General and his representatives have the right to examine the books, documents, papers and records of the company relating to or otherwise disclosing these production costs. Defendants were ordered to make this information available to the Government.[5]

Hewlett-Packard argues that the decision of the district court gave no effect to the words of limitation contained in 10 U.S.C. § 2313(b), and reflected in clause 10 of each contract.

The words of limitation to which the company refers limit the records which may be examined by the Comptroller General and his representatives to those "of the contractor, or of any of his subcontractors, *that directly pertain to, and involve transactions relating to, the contract or subcontract.*" (Emphasis supplied.) Hewlett-Packard asserts that

5. The trial court stayed the injunctive provisions of the judgment pending disposition of this appeal.

the district court has, in effect, placed a period after the word "subcontractors" in the quoted clause, and has thus given no practical effect to the words of limitation.

A mere reading of the judgment indicates that this is an overstatement. If, in its decree, the district court had placed a period after the word "subcontractors," then the Comptroller General and his representatives would have been authorized to examine the books of the company without limitation. Instead, the court declared that the Comptroller could examine any such records

> "relating to the cost of producing the items furnished by Hewlett-Packard Company under the aforesaid contracts, including costs of direct material, direct labor and overhead costs. . . ."

It is therefore clear that the district court sought to give effect to the words of limitation. The question is whether it gave full effect to those words. This depends upon the meaning to be attached to those words.

The key word in the limitation clause is "contract." If that word is used in section 2313(b) only with reference to the terms and condition of an agreement and the procedures whereby those terms and conditions were formulated, then the district court failed to give full effect to the limitation clause. As Hewlett-Packard correctly points out, under the stipulated facts summarized above, production costs were not taken into consideration in arriving at the terms and conditions of the contracts in question. Thus data pertaining to production costs could not be said to directly pertain to, and involve transactions relating to, the contract, as so defined.

In our opinion, however, the word "contract," as used in this statute is intended to have a broader meaning, embracing not only the specific terms and conditions of the

agreement, but also the general subject matter. The subject matter of these four contracts is the procurement of described property by the Government.

Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs. Production costs involve transactions relating to the contract, because they encompass business arrangements made by the contractor in obtaining the materials, labor, facilities and the like required by it in fulfilling its commitment with reference to the subject matter of the contract.

Hewlett-Packard contends, in effect, that the sole purpose of the examination right accorded by section 2313(b) and clause 10 of these contracts, is to enable the Comptroller General to find out whether the particular contracts which give rise to the examination had been performed in accordance with their terms and whether the contracting officer had been defrauded or misled in entering into the contract.

We finding nothing in the words of the statute, its legislative history, or administrative interpretation, or in the impact of other statutes, which supports this view. On the contrary, it seems to us that if such a limited scope of examination had been intended by Congress it would have found the means to so indicate. The term "contract" could have been given a restricted meaning, or the scope of the permissible examination could have been specifically limited to lines of inquiry relevant to the legality and faithful performance of the particular contract giving rise to the examination.

Affirmed.